

Internal Revenue Service

Number: **200706008**

Release Date: 2/9/2007

Index Number: 457.05-00, 408.12-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

Telephone Number:

Refer Reply To:

CC:TEGE:EB:QP2

PLR-156460-05

Date:

September 29, 2006

Legend

C =

Plan =

Dear :

This responds to your authorized representative's letter of October 31, 2005, and subsequent correspondence, on behalf of C and its 457 Plan, requesting a ruling concerning the proposed amended and restated deferred compensation plan (the "Plan") which C intends to be an updated eligible deferred compensation plan under section 457(b) of the Internal Revenue Code of 1986 (the "Code"), as amended under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and in subsequent legislation. The Plan has been or will be adopted only by C and its related agencies and instrumentalities which are all represented to be eligible local governmental employers described in section 457(e)(1)(A) of the Code.

Under the Plan a participant, an employee of C or one of its related agencies and instrumentalities, may elect to defer compensation that would have been received for services rendered to C in any taxable year until death, severance from employment, attainment of age 70½, or until the occurrence of an unforeseeable emergency. The Plan also contains a provision allowing an elective in-service distribution of \$5,000.00 or less to be paid to a participant from his or her account in certain limited circumstances set forth thereunder and in section 457(e)(9)(A).

The Plan also permits its board to establish a program allowing the plan's participants to take loans from their plan accounts, subject to certain restrictions. Loans made under the Plan are subject to rules in the Plan and in § 1.457-6(f)(2) of the Income Tax Regulations, including provisions restricting the maximum amount and term of a plan loan.

A participant's election under the Plan to defer compensation not yet paid (including post-severance compensation paid within 2½ month after severance from employment) must be filed prior to the beginning of the month in which the compensation to be deferred is paid or made available. The Plan provides for a maximum amount that may be deferred by a participant in any taxable year and also provides for a catch-up computation for amounts deferred for one or more of the participant's last three taxable years ending before he attains normal retirement age under the Plan.

The Plan also provides for the age 50 plus catch-up contributions described in section 414(v). However, the Plan provides that a participant can only utilize one of the two catch-up contribution provisions during a single year. The amounts that may be deferred under the annual maximum limitation and the catch-up provisions are within the limitations of section 457, including the section 457(c) coordinated deferral provision.

In addition, a participant may make voluntary contributions to the "deemed IRA" or "deemed Roth IRA" offered in the Plan, if he or she meets and complies with certain requirements established thereunder. The deemed IRA funds would be held by a custodian which is a bank described in section 408(n) of the Code.

With certain limitations, a participant, beneficiary or alternate payee may elect the manner in which his/her deferred amounts will be distributed. The Plan provides that the manner and time of benefit payout must meet the distribution requirements of section 401(a)(9) of the Code.

The Plan provides that amounts of compensation deferred thereunder are to be transferred to and held in custodial accounts described in section 457(g)(3) for the exclusive benefit of the participants and their beneficiaries. All amounts deferred under the Plan must be transferred to the appropriate accounts within a short period after such compensation would otherwise have been paid. The rights of any participant or beneficiary to payments pursuant to the Plan are generally nonassignable and not subject to pledge, attachment or encumbrance.

In addition, the Plan provides that certain compensation described therein, including payments for accrued bona fide sick, vacation or other leave, may be contributed and deferred into the participant's account in the Plan within 2½ months after the participant's severance from employment if the participant has properly and timely made an election to defer such compensation before the beginning of the month in which such amounts would otherwise be paid.

Section 457 of the Code provides rules for the deferral of compensation by an individual participating in an eligible deferred compensation plan as defined in section 457(b).

Section 457(a)(1)(A) of the Code provides that in the case of a participant in an eligible governmental deferred compensation plan, any amount of compensation deferred under the plan and any income attributable to the amounts so deferred shall be includible in gross income only for the taxable year in which such compensation or other income is paid to the participant or beneficiary.

Section 457(b)(5) prescribes that an eligible deferred compensation plan must meet the distribution requirements of section 457(d).

Section 457(d)(1)(A) provides that for a section 457 plan to be an eligible plan, the plan must have distribution requirements providing that under the plan amounts will not be made available to participants or beneficiaries earlier than i) the calendar year in which the participant attains age 70½, ii) when the participant has a severance from employment with the employer, or iii) when the participant is faced with an unforeseeable emergency as determined under Treasury regulations.

Section 457(e)(1)(A) defines an eligible employer to be a state, political subdivision of a state, any agency or instrumentality of a state or political subdivision of a state.

Section 457(g) provides that a plan maintained by an eligible governmental employer shall not be treated as an eligible deferred compensation plan unless all assets and rights purchased with such deferred compensation amounts and all income attributable to such amounts, property, or rights of the plan are held in trust, for example in custodial accounts or annuity contracts, for the exclusive benefit of participants and their beneficiaries. Section 457(g)(3) provides that custodial accounts and contracts described in section 401(f) shall be treated as trusts under rules similar to the rules under section 401(f).

Proposed Regulations § 1.457-4(d) of the Income Tax Regulations, published in the Federal Register for May 31, 2005, 70 FR 31214, 31254, provides that participants in eligible section 457(b) plans may elect to defer accumulated sick pay, accumulated vacation pay, and back pay if certain conditions are met. First, the accumulated back pay must be paid to the participant or deferred into his section 457(b) plan account within 2½ months following severance from employment. Additionally, these amounts may be deferred for any calendar month only if an agreement providing for that deferral is entered into before the beginning of the month in which the amounts would otherwise be paid or made available. The preamble to these proposed regulations states, “[p]ending issuance of final regulations, taxpayers may rely on the modifications . . . contained in . . . § 1.457-4(d) regarding post-severance compensation payments and other compensation timing rules. . . . Pursuant to this reliance, taxpayers may apply the proposed amendments described in this paragraph for periods prior to the effective date of final regulations.”

Section 408(q) of the Code provides that if a qualified employer plan (including a governmental section 457(b) plan) allows employees to make voluntary contributions to a separate account under the plan, and under the terms of such plan, the account meets the applicable requirements of section 408 (relating to IRAs) or section 408A (relating to Roth IRAs), then such separate account shall be treated as an IRA (or Roth IRA) and not as a qualified employer plan.

Based upon the provisions of the Plan summarized above and the documents presented, we conclude as follows:

1. The proposed amended and restated Plan constitutes an eligible deferred compensation plan as defined in section 457(b) of the Internal Revenue Code of 1986 as amended under EGTRRA.
2. Amounts of compensation deferred in accordance with the Plan, including any income attributable to the deferred compensation, will be includible under section 457(a)(1)(A) in the recipient's gross income only for the taxable year or years in which amounts are paid to a participant or beneficiary in accordance with the terms of the Plan.
3. The Plan's deemed IRA provision, as submitted on June 6, 2006, satisfies the form requirements of a traditional IRA under section 408 of the Code or a Roth IRA provision under section 408A, provided that the trustee or custodian of the IRA assets is a bank described in section 408(n) or has been approved by the IRS pursuant to section 408(a)(2). Thus the form of the Plan's deemed IRA provision does not adversely affect the status of

- the Plan as an eligible deferred compensation plan under section 457(b) of the Code.
4. Concerning elective deferrals of accumulated sick, annual, vacation and other leave pay, and back pay into the Plan, such annual deferrals contributed to the Plan within 2½ months after the participant's severance from employment in accordance with Prop. Reg. § 1.457-4(d) will not cause the Plan to lose its status as an eligible plan under section 457, and such deferrals, including any income earned thereon will be includible in the gross income of the recipient only in the taxable year or years when such amounts are paid.

No opinion is expressed concerning the timing of the inclusion in income of amounts deferred under any deferred compensation plan other than the above-described Plan. If the amended and restated Plan is significantly modified, this ruling will not necessarily remain applicable. Revised regulations under § 1.457-4(d) pertaining to the issues concerning the deferral of certain post-severance compensation addressed in this ruling have not yet been adopted. Therefore, Ruling Number 4 may be modified or revoked if the adopted final regulations are inconsistent with any conclusion in this ruling. See section 11.04 of Rev. Proc. 2006-1, 2006-1 I.R.B. 1, 49. However, when the criteria in section 11.06 of Rev. Proc. 2006-1 are satisfied, a ruling is generally not revoked or modified retroactively.

This ruling is directed only to the Plan and not to any other section 457(b) plan, and it applies only if C adopts the revised Plan submitted on June 6, 2006. Section 6110(k)(3) of the Internal Revenue Code provides that this ruling may not be used or cited as precedent.

Sincerely,

Robert D. Patchell
Chief, Qualified Plans Branch 2 (Employee
Benefits)
(Tax Exempt & Government Entities)

Enclosure (1)
cc: Chief of Examination, C:T:EP